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In The

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-875

WILLIAM T. RANKIN,

Appellant,

vs.

STATE OF OHIO,

Appellee.

On Appeal From The Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

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On Appeal From The Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

Now comes the State of Ohio, Appellee by Simon L. Leis, Jr., Prosecuting Attorney and Leonard Kirschner and Thomas P. Longano, Assistant Prosecuting Attorneys of Hamilton County, Ohio, and respectfully moves this Court for an order dismissing the appeal for the reasons that Ohio Revised Code 2945.67 to 2945.70 are not repugnant to the United States Constitution and there has been no denial of Appellants constitutional rights in the proceedings below as reflected in the record of the hearing on the Motion to Suppress and the opinions of the Court of Appeals and the Supreme Court of Ohio.

OPNIONS BELOW

The Petition of the Petitioner correctly cites the opinions below (Appendix, pp. 1a-6a).

JURISDICTION

The appeal of the Appellant from the order of the Supreme Court of Ohio entered September 9, 1977, which denied jurisdiction for the reason that there was no substantial constitutional question presented presents the questions of whether the appeal by the State of Ohio from a pretrial ruling on a Motion to Suppress evidence is violative of the defendant-appellants rights under the IV, V, VI and XIV Amendments of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

The IV, V, VI and XIV Amendments to the United States Constitution and Ohio Revised Code 2945.67 through 2945.70 and Criminal Rule 12 J.

IV Amendment, United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . ."

V Amendment, United States Constitution

"No person shall be deprived of life, liberty, or property without due process of law."

VI Amendment, United States Constitution

"In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

XIV Amendment, United States Constitution

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code Section 2945.67

"The prosecuting attorney, solicitor, or the attorney general may except to a decision of the court and present a bill of exceptions thereto. The court shall sign said bill and it shall be made a part of the record."

Ohio Revised Code Section 2945.68

"The prosecuting attorney, solicitor, or the attorney general may present a bill of exceptions in a criminal action to the court of appeals or the supreme court and apply for permission to file it with the clerk of the court for the decision of such court upon the points presented therein. Prior thereto, he shall give reasonable notice to the judge who presided at the trial in which such bill was taken, of his purpose to make such application. If the court of appeals or the supreme court allows the bill to be filed, the prosecuting attorney, solicitor, or attorney general shall, within ten days of the filing of the bill, file his brief in support of such exceptions and forthwith serve a copy thereof upon the trial judge and any attorney appointed by the judge to argue the exceptions against the prosecuting attorney, solicitor, or the attorney general."

Ohio Revised Code Section 2945.69

"The trial judge may appoint some competent attorney to argue the bill of exceptions against the prosecuting at-

torney, solicitor, or the attorney general under section 2945.68 of the Revised Code, and such appointee shall receive for his services a fee of not more than one hundred dollars, to be fixed by the judge and paid out of the treasury of the county in which the bill was taken. Such attorney shall file his brief against the prosecuting attorney, solicitor, or the attorney general within ten days after service upon him of the brief in support of said exceptions. The hearing of such cases shall have precedence of other business and such cases shall be continued upon the docket of the court of appeals or the supreme court until argued and submitted."

Ohio Revised Code Section 2945.70

"If the court of appeals or the supreme court is of the opinion that the questions presented by a bill of exceptions should be decided, it shall allow the bill of exceptions to be filed and render a decision thereon. This decision shall not affect the judgment of the trial court in said cause, nor shall said judgment of the trial court be reversed, unless the judgment of the court of appeals or the supreme court reverses the judgment of the trial court on its ruling on a motion to quash, a plea in abatement, a demurrer, a motion to suppress evidence, or a motion in arrest of judgment. In all other cases the decision of the court of appeals or the supreme court shall determine the law to govern in a similar case."

Criminal Rule 12 J – Ohio Rules of Criminal Procedure

"The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies: (1) the appeal is not taken for the purpose of

delay; (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be diligently prosecuted.

If the defendant has not previously been released, he shall, except in capital cases, be released from custody on his own recognizance pending such appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals."

QUESTIONS PRESENTED BY THE APPEAL

I

WHETHER THE UNITED STATES SUPREME COURT WILL ENTERTAIN NEW MATTERS NOT PREVIOUSLY BROUGHT TO THE ATTENTION OF EITHER THE TRIAL COURT OR TO THE ATTENTION OF THE OHIO COURT OF APPEALS WHICH IS THE COURT OF ORIGINAL APPELLATE JURISDICTION.

II

WHETHER THE DECISION OF THE OHIO SUPREME COURT DISMISSING THE APPELLANTS APPEAL ON A FINDING OF NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS A FINAL AND APPEALABLE ORDER.

III

WHETHER OHIO REVISED CODE SECTIONS 2945.67 THROUGH 2945.70 WHICH GRANTS THE STATE THE RIGHT TO APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE IS A DENIAL OF EQUAL PROTECTION AND DUE PROCESS OF LAW.

IV

WHETHER OHIO REVISED CODE SECTION 2945.67 THROUGH 2945.70 DENIES THE APPELLANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE CASE IS ARGUED AT THE APPELLATE LEVEL BY COUNSEL APPOINTED BY THE TRIAL

COURT AND WHERE THE DEFENDANT IS A PARTY TO THE PROCEEDING AND WHERE THE COUNSEL APPOINTED IS THE SAME AS COUNSEL RETAINED BY THE PETITIONER TO REPRESENT HIM AND WHERE THE PETITIONER DOES NOT OBJECT TO THE PROCEDURE.

V

WHETHER THE SUPREME COURT OF OHIO ERRED TO THE PREJUDICE OF THE PETITIONER BY UPHOLDING THE DECISION OF THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO, AND BY DISMISSING THE PETITIONERS APPEAL UPON THE GROUND THAT NO SUBSTANTIAL CONSTITUTIONAL QUESTION WAS PRESENTED.

STATEMENT OF THE CASE

On August 15th, 1975 Sergeant Paul Guthrie was assigned to the Regional Enforcement Narcotic Unit and was on duty. Between 8:00 P.M. to 9:00 P.M. Sergeant Guthrie received information (TP 42) from a reliable and confidential informant (TP 31). This informant had provided Agent Guthrie with information in the recent past which resulted in the seizure of heroin and a conviction (TP 31, 32).

The information given to police indicated that a shipment of heroin from California was due to arrive in the city on August 15th, 1975. The shipment of narcotics was to be received by a man known to Sergeant Guthrie as one "Gray Eyes," also known as Fred Douglas. Information also indicated that a co-conspirator in the shipment would be driving a Cadillac sedan equipped with a telephone antenna on the trunk bearing California license plates. The information further indicated that a second vehicle would also be involved and would be operated by an individual from Knoxville, Tennessee (TP 32).

Both vehicles were to meet at Fred Douglas' home located in Springfield Township, Hamilton County, Ohio. The Douglas home was famliiar to Sergeant Guthrie (TP 32).

Sergeant Guthrie was further informed that one "Chipper" Rankin, the defendant herein, was to receive a part of the shipment from the larger shipment to be received by Douglas (TP 32). In an effort to verify the information given him, Sergeant Guthrie went to the home of Fred Douglas. The Sergeant observed two vehicles which fit the description given to him by the informant. One vehicle was a red and white late model Cadillac sedan, bearing California license plates with a radio antenna located

on the rear of the vehicle. The second vehicle was a black Buick sedan bearing Tennessee license plates. This observation occurred at approximately ten or eleven o'clock on August 15th. (TP 32, 33).

After further investigations Agent Guthrie went to the home of the defendant located at 8845 Harpers Point Drive in Symmes Township, Hamilton County, Ohio.

Prior to August 15th, Sergeant Guthrie kept the defendant under surveillance on fifteen or sixteen different days, four or five of which were at the defendant's home (TP 58, 59). The investigation involved observation of the defendant and another man in reference to narcotic drugs (TP 30).

Sergeant Guthrie knew that the defendant was driving a 1975 Pontiac Grand Prix, bearing 1975 Ohio license plate # CHIP 5 (TP 33).

At approximately 1:30 A.M. on August 16th a surveillance position was taken one hundred to one hundred fifty yards from the defendant's apartment. With the aid of binoculars the Sergeant observed the defendant in a second floor bedroom. (TP 33).

At approximately twenty minutes or a quarter til two the defendant was seen on the telephone (TP 33). Seconds later the defendant emerged from a door and proceeded to the parking lot with only a cigarette in his hand. He entered a 1975 Pontiac, Ohio license #CHIP 5 and departed (TP 34).

The defendant was followed onto I-275 where he reached speeds of 90 m.p.h. The defendant eventually led police to a subdivision known as Lexington Heights, located in Springfield Township. The defendant proceeded to Newbrook Avenue where Fred Douglas lived (TP 34).

Sergeant Guthrie notified two other R E N U units, one to take position at Hudepohl Lane and one at Hamilton Avenue (TP 34).

The defendant was observed entering the home of Fred Douglas empty handed. Seventeen minutes later the dfendant emerged from the house moving at a fast pace (TP 35).

When the defendant exited he was carrying a package. The package being carried by the defendant was larger than the width of his hands. It extended from both sides of his hand (TP 36). Based upon the information given police, Sergeant Guthrie believed that a delivery of heroin had just taken place. Sergeant Guthrie at that point in time decided to make an arrest for possession of narcotics (TP 52) (TP 91) however, he was waiting for a safe place to do it (TP 54).

Both the defendant and Sergeant Guthrie entered their cars. The defendant in driving his vehicle approached Guthrie's vehicle from the rear. The defendant drove up alongside the Sergeant's car and looked in his direction. At this point, Officer Handorf was situated directly behind the defendant and Officer Stears was proceeding toward the front of the defendant's car (TP 36, 37). The defendant turned and spotted the agents (TP 50).

The defendant knew Sergeant Guthrie for approximately two years and knew that he was a police officer with the Regional Enforcement Narcotic Unit (TP 16). The defendant also knew the identity of Officer Handorf for over two years (TP 17).

After observing the officers (TP 86) the defendant departed at a high rate of speed. The police units were ordered to follow him, and a high speed chase ensued. A request was made for marked Springfield Township and Hamilton County cars to join in to aid the R E N U agents (TP 37).

The defendant at one point while driving his vehicle on

Playtime Lane, reduced the speed of his vehicle to about 5 m.p.h. and pulled to the opposide side of the street (TP 37, 65). The defendant then sped forward again at a high rate of speed (TP 37). The police overtook the defendant's car about a block and a half away (TP 65).

As officers approached the vehicle they observed the defendant holding a switchblade knife in his left hand. At the same time he was leaning across the seat in the direction of the glove compartment. The defendant was ordered to drop the knife and open the car door which had been locked (TP 37).

Officer Handorf was looking directly into the vehicle and likewise saw the knife in the defendant's hand. He also saw the defendant lean toward the glove compartment. Handorf took the knife from the defendant and recovered a loaded .38 caliber revolver from the glove compartment which was located in the area to which the defendant was reaching (TP 66). The gun was later test fired and found to be operable (TP 39).

The defendant was placed under arrest as soon as police saw him in possession of the switchblade knife (TP 41). The arrest took place at approximately 2:30 A.M.

The defendant was advised of his constitutional rights and indicated to police that he understood them (TP 68). The defendant told police that he had the gun for protection (TP 72).

Sergeant Guthrie ordered Agent Handorf to conduct a foot check of the vicinity where the defendant's vehicle had previously slowed down on Playtime Lane (TP 40).

Agent Handorf retraced the route that the defendant took in an effort to locate the Heroin. When the officer reached the spot on Playtime Lane where the defendant

had reduced his speed, he found the bag laying on the ground (TP 73).

The bag was returned to Sergeant Guthrie and opened in his presence (TP 40). The contents of the bag was identified State's Exhibit #3 (TP 73). The substance was heroin (TP 93).

The defendant was identified by Sergeant Guthrie as the man involved in this incident. Sergeant Guthrie knew the defendant for two and a half years prior to this event (TP 29).

State's Exhibit #1, a .38 caliber gun; State's Exhibit #2, a switchblade knife; State's Exhibit #3, the heroin, and State's Exhibit #6, a report were all marked and identified at the hearing.

Officers did not attempt to obtain a search warrant because they were attempting to establish probable cause first (TP 44). The police were still in the process of gathering information (TP 46) and attempting to verify that information (TP 63) when they observed the final events in the late evening hours on August 15, 1975, and early morning hours of August 16th.

The rapid succession of the events as they occurred in this case necessitated that police move quickly. Once police verified the information and established probable cause there was no time to secure a search warrant.

Defendant-Appellant was subsequently indicted for the crime of possession of narcotics and carrying a concealed weapon.

Prior to trial he filed a Motion to Suppress which was granted by the trial Court. In accordance with Rule 12 J of the Rules of Criminal Procedure and in accordance with Ohio Revised Code 2945.67 through 2945.70 inclu-

sive; the plaintiff-appellee filed a Motion for Leave to Appeal in the Court of Appeals of the First Appellate District of Ohio. Briefs were filed by privately retained counsel on behalf of the defendant-appellant and the trial Court. At no time were the issues raised in the appellants first three questions ever raised in the Court of Appeals. The Court of Appeals determined that the trial Court was incorrect in granting the Motion to Suppress and reversed and remanded the matter back to the trial Court for further proceedings and trial.

At that point in time current privately retained counsel for the defendant-appellant officially filed a Motion to Intervene and to be substituted as counsel in this matter. New counsel then for the first time raised the issues presented in questions one through three to the Ohio Supreme Court which questions had never previously been raised. The Supreme Court of Ohio determined that there were no matters of great public importance nor substantial constitutional questions involved and denied jurisdiction.

From that decision defendant-appellant has filed his Notice of Appeal to this Court.

ARGUMENT

I

WHETHER THE UNITED STATES SUPREME COURT WILL ENTERTAIN NEW MATTERS NOT PREVIOUSLY BROUGHT TO THE ATTENTION OF EITHER THE TRIAL COURT OR TO THE ATTENTION OF THE OHIO COURT OF APPEALS WHICH IS THE COURT OF ORIGINAL APPELLATE JURISDICTION.

We submit that it is a basic and fundamental rule of appellate procedure that an upper appellate Court will not consider matters not previously raised in the lower Court. The defendant-appellant in these proceedings never through his privately retained counsel ever raised the issues involved in his questions one through three inclusive before either the trial court or the original appellate Court. It was only after the appellate court ruled that he raised these issues for the first time in the Ohio Supreme Court.

It is an established rule of long standing in Ohio that a constitutional question in a criminal case cannot be raised in the Ohio Supreme Court on appeal unless it was argued in the lower Courts. *State of Ohio* v. *Phillips,* 27 O.S. (2d) 294 (1971).

We feel that this deficiency in and of itself is a sufficient basis upon which the Motion to Dismiss should be granted.

II

WHETHER THE DECISION OF THE OHIO SUPREME COURT DISMISSING THE APPELLANT'S APPEAL ON A FINDING OF NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS A FINAL AND APPEALABLE ORDER.

III

WHETHER OHIO REVISED CODE SECTIONS 2945.67 THROUGH 2945.70 WHICH GRANTS THE STATE THE RIGHT TO APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE IS A DENIAL OF EQUAL PROTECTION AND DUE PROCESS OF LAW.

IV

WHETHER OHIO REVISED CODE SECTION 2945.67 THROUGH 2945.70 DENIES THE APPELLANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE CASE IS ARGUED AT THE APPELLATE LEVEL BY COUNSEL APPOINTED BY THE TRIAL COURT AND WHERE THE DEFENDANT IS A PARTY TO THE PROCEEDING AND WHERE THE COUNSEL APPOINTED IS THE SAME AS COUNSEL RETAINED BY THE PETITIONER TO REPRESENT HIM AND WHERE THE PETITIONER DOES NOT OBJECT TO THE PROCEDURE.

We have joined questions II, III and IV for the purposes of argument in light of the fact that they are interrelated.

First of all what the defendant is endeavoring to appeal is a decision by a Court of Appeals that has determined that the lower Court incorrectly granted a pretrial Motion to Suppress evidence.

In Ohio Criminal Rule 12 J is read in conjunction with Ohio Revised Code 2945.67 through 2945.70 in granting to the State the limited right of appeal by leave of Court (*State* v. *Waller,* 47 O.S. (2d) 52 (1976)).

This Court on numerous occasions reflected that the granting or denial of a pre-trial Motion to Suppress in and of itself is not a final appealable order.

In the case of *DiBella* v. *United States,* 369 U.S. 148, 82 S. Ct. 654 (1962) at page 660:

> "We hold, accordingly, that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. . . . Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding . . . . an indictment—in each such case the order on a suppression motion must be treated as 'but a step in the criminal case preliminary to the trial itself'."

This Court has further stated in the case of *United States* v. *Ryan,* 402 U.S. 530, 91 S. Ct. 1580 (1971) at page 1582:

> "Only in the limited class of cases where the denial of immediate review would render impossible any review whatsoever of an individuals' claims have we allowed exceptions to this principle. We have thus indicated that review is available immediately of a denial of a motion for return of seized property, where there is no criminal prosecution pending against the movant."

As the United States Circuit Court of Appeals held in the case of *United States* v. *Peachtree National Distributors,* 456 F. (2d) 442 (1972) at page 444:

> "The generally recognized policy supporting the rule limiting appellate review to 'final decisions' is the need for sound judicial administration. Limiting review to final decrees saves the expense and delay of numerous appeals in the same suit and permits the

> whole case and every matter in controversy to be decided in a single appeal . . . The Supreme Court has deviated from the finality rule only where the adjudication appealed from was complete and independent of other litigation."

The rights and interest of defendant-appellant in this case may be protected by way of his direct appeal if he is subsequently convicted.

Title 18 U.S.C.A. Section 3731 permits the United States to appeal an order granting a motion to suppress evidence. Ohio also provides the state with a similar right to appeal such orders under Section 2945.67 through 2945.70 Revised Code of Ohio and Criminal Rule 12 (J).

The fact that Congress has given the United States the right to appeal in such cases does not compel the courts to grant a similar right to defendants, *United States* v. *Peachtree National Distributors,* supra.

Where a motion to suppress evidence is granted the state will almost always be left in the position of having no case and consequently no future appellate review. Hence, a trial Court could be permitted to make an error of law and have that error unchallenged without the State having a right to appeal.

Where a motion to suppress evidence is denied the defendant can still preserve his objections on appeal from the final judgment on the merits.

It is submitted that law enforcement depends upon the use of search warrants. They have become a valuable tool in the criminal prosecution. If an appeal were permitted at each instance that a motion to suppress evidence was denied we would face delays and disruptions which would unduly hamper the administration of criminal law.

Counsels basic argument as set forth in his third question presented for review of this Court and which is our question #4 is not supported by the facts and occurances in the lower Court.

In the case currently before this Court; the trial Court appointed the defendant-appellant's privately retained counsel to represent the interests of the Court and the defendant-appellant. Briefs and appearances were made in the Court of Appeals by privately retained counsel of the defendant-appellant who signed the briefs as counsel for the defendant-appellant. At no time prior to the Court of Appeals ruling did the defendant-appellant ever object to his privately retained counsel handling his appeal. After the Court of Appeals reversed the trial Court on the Motion to Suppress; current privately retained counsel came into the picture. At no time prior to his filings in this Court has he ever raised the matters presented in his question #3 (our question #4).

The only issue counsel raised in the Ohio Supreme Court on these statutes (2945.67-2945.70 and Criminal Rule 12 J) was that said sections were unconstitutional because they gave the state the right of appeal from an adverse ruling on a motion to suppress which was not given to the defendant. It is also to be noted that even this issue was never raised in the Ohio appellate Court of original appellate jurisdiction.

We then end up with the situation that the defendant-appellant is now claiming alleged errors to which he was a party and never objected anywhere in the state courts about the alleged errors.

V

WHETHER THE SUPREME COURT OF OHIO ERRED TO THE PREJUDICE OF THE PETITIONER BY UPHOLDING THE DECISION OF THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO, AND BY DISMISSING THE PETITIONER'S APPEAL UPON THE GROUND THAT NO SUBSTANTIAL CONSTITUTIONAL QUESTION WAS PRESENTED.

Respondent respectfully submits that the actions taken by law enforcement officers in the case at bar were proper based upon any or all of the following reasons:

(A) The warrantless arrest of a defendant is lawful when the police have probable cause to believe that the defendant is engaging in criminal activity, based upon reliable information received from a trustworthy source, coupled with independent investigative efforts by police which verify the accuracy of the information.

(B) A police officer may conduct a warrantless search when that search is incident to a lawful arrest, in order to protect himself and to protect the potential destruction of evidence, and any items recovered as a result of that search are admissible as evidence.

(C) Objects falling within the plain view of a police officer who has a right to be in the position to have that view are lawfully subject to seizure and may be introduced as evidence.

Where property is found abandoned in an area free of any expectancy of privacy, there is no

standing to object to its subsequent search or seizure, due to the fact that there is no reasonable expectation of privacy and therefore there is no constitutional interest to be protected.

(A) The warrantless arrest of a defendant is lawful when the police have probable cause to believe that the defendant is engaging in criminal activity, based upon reliable information received from a trustworthy source, coupled with independent investigative efforts by police which verify the accuracy of the information.

It is submitted that it is well established that the test for probable cause is the same, whether the issue is probable cause to make an arrest or to obtain a search warrant. *Giordenello* v. *United States,* 357 U.S. 480 (1958).

The Supreme Court of the United States stated in *Beck* v. *State of Ohio,* 379 U.S. 89 (1964) that whether an arrest was constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make that arrest. The test is whether at that moment the facts and circumstances within their knowledge and of which they have reasonably trustworthy information were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating often opposing interests. Requiring more would unduly hamper law enforcement.

When the constitutional validity of an arrest is challenged, it is the function of a Court to determine whether the facts available to the officers at the moment of the arrest

would warrant a man of reasonable caution in the belief that an offense has been committed. *Beck,* supra.

The Supreme Court of Ohio has followed this same line of reasoning in *State* v. *Timson,* 38 Ohio St. (2d) 122 (1974). The Court stated that before a police officer could make an arrest he must have probable cause. To have probable cause the officer must have reasonably sufficient information and this information must have been derived from a reasonably trustworthy source, which would indicate to a prudent man, and lead him to believe, that a felony was committed, and that it was committed by the accused.

It must be remember that the probable cause necessary to arrest required less facts than are necessary for conviction and the amount and method of proof is less strict. See *Jones* v. *United States,* 362 U.S. 257 (1960).

It is respectfully submitted that the R.E.N.U. agents in the instant case did have sufficient probable cause to believe that the defendant was engaged in criminal activity. The information was derived from a reasonable trustworthy source and was verified by the independent investigative efforts of the police. The police personally observed the defendant's suspicious conduct which helped to serve as a basis for leading a prudent man to believe a crime was in progress.

Probable cause to arrest the defendant was based upon the following information and facts:

1). Police received information from a reliable and confidential informant whose past information proved to be credible.

2). The information revealed that a shipment of heroin was coming into the city from California and would be delivered to the residence of a one Fred Douglas also known as "Grey Eyes."

3). The description of two vehicles involved in the operation were observed parked at the Douglas residence and this was verified by Sergeant Guthrie.

4). Police were informed that the defendant would receive a portion of the heroin shipment at the Douglas home.

5). At approximately 1:45 A.M. on August 16th the defendant was observed leaving his home and drive off at a high rate of speed.

6). The defendant went to the home of Fred Douglas and left shortly thereafter carrying a container.

7). When police attempted to follow the defendant he spotted them and prove off at a high rate of speed. His driving became erratic.

8). During the course of the chase the defendant at one point on Playtime Lane slowed his car down to almost a complete halt, moved to the wrong side of the road, then sped away.

9). Officers eventually overtook the defendant's vehicle and while approaching the car spotted the defendant holding a switchblade knife in his hand.

10). The defendant was attempting to reach in the direction of a closed glove compartment. A loaded .38 caliber pistol was found in this same glove compartment.

11). The defendant was placed under arrest as soon as police spotted the knife in his hand.

It is therefore submitted that based upon the totality of the circumstances the police did have probable cause and reasonable grounds to believe that the defendant was in-

volved in a crime. They were acting on considerably more than just mere suspicion. The police were justified in stopping the defendant's car in furthering their investigation, and to make an arrest. The actions of the defendant were not consistent with those of an innocent man. Based upon the totality of the circumstances it cannot be said that police lacked probable cause to stop the defendant and arrest him.

In addition, the seizure of the defendant's vehicle was reasonable and lawful as it was an instrumentality of the crime.

Flight of the accused is, of course, a circumstance tending to prove consciousness of guilt. A police officer in establishing probable cause to arrest need not be in possession of sufficient evidence to ensure a conviction. The rule is that in determining the validity of an arrest on probable cause, the Court is dealing with probability and not with the certainty that an offense has been or is being committed. The constitutional requirement of probable cause for arrest serves the purpose of protecting the citizenry from unreasonable intrusions by the State, not of insuring that no innocent person will even be arrested. *United States* v. *Bowers,* 458 F. 2d 1045 (5th Cir. 1972).

Probable cause does not emanate from an antiseptic courtroom, a sterile library or a Holy sacrosanct adytum, nor is it a pristine philosophical concept existing in a vacuum, *Bell* v. *United States,* 254 F. 2d 82 (D. C. 1958), but rather it requires a pragmatic analysis of everyday life on which reasonable and prudent men, not legal technicians act. *Brinegar* v. *United States,* 338 U.S. 160 (1949).

Probable cause is to be viewed from the vantage point of a prudent, reasonable, cautious police officer on the scene at the time of the arrest guided by his experience

and training. *Jackson* v. *United States,* 302 F. 2d 194 (D.C. 1962). The officers in the case at bar were well trained and experienced in the area of narcotic arrests.

The facts in the instant case closely parallel those in the case of *Draper* v. *United States,* 358 U.S. 307 (1959). In *Draper,* agents were given information which when checked out by investigation proved to be accurate. The Court in *Draper* held that the arrest was lawful even though without a warrant, because it was based upon probable cause and reasonable grounds for believing the defendant was committing a crime. See also *United States* v. *Upthegrove,* 504 F. 2d 682 (6th Cir. 1974).

It is submitted that once probable cause was established the officers in the case at bar were permitted to stop the defendant's vehicle and based upon the exigency of the circumstances were permitted to conduct a search of the vehicle.

The Court in *Chambers* v. *Maroney,* 399 U.S. 42 (1970) held that where probable cause and exigent circumstances exist, police may conduct a warrantless search of the defendant's automobile.

In the instant case probable cause did exist as argued previously. The exigent circumstances necessitating an immediate search are illustrated as follows:

1). The police stopped the defendant's car in the early morning hours after a high speed auto chase involving the erratic driving of the defendant.

2). Police had information from a reliable source which indicated that the defendant was involved in the trafficking of "hard" narcotic drugs.

3). Police had reasonable grounds to believe that the defendant had just made a pick up of heroin, when he left the home of Fred "Grey Eyes" Douglas.

4). When police approached the defendant's car they saw a switchblade knife in his hand and he was reaching in the direction of a closed glove compartment.

5). The arrest took place at approximately 2:30 A.M., on an open public street, not far from the home of Fred Douglas.

In order to protect themselves and to prevent the possible destruction of evidence police lawfully searched the immediate area within defendant's area of control.

In *Carroll* v. *United States,* 267 U.S. 132 (1925) and cited in *Chambers,* the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided there is probable cause. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The mobility of an automobile makes a warrantless search of an automobile reasonable when probable cause is present. The opportunity to search is fleeting since a car is readily movable.

For constitutional purposes the Court saw no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand, carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the fourth Amendment. *Chambers,* supra.

It is therefore submitted that the seizure of the .38 caliber handgun from the glove compartment was lawful and should not have been suppressed by the trial court.

It is further submitted that the switchblade knife found in the defendant's hand likewise should not have been suppressed by the trial court. When police approached the defendant's car they observed him with a switchblade knife in his hand. This observation was *not* gained as a result of any search but rather was in the officer's "plain view." Courts have long permitted seizure of items which fall within "plain view."

The Supreme Court of the United States held in *Harris* v. *United States,* 390 U.S. 234 (1968):

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. . . ."

It is submitted that the RENU agents were lawfully positioned outside defendant's car. They had a lawful right to be where they were and a lawful right to do what they did.

Appellee respectfully submits that the police under the facts and circumstances in the case at bar were not required to obtain a search warrant.

The Court held in *United States* v. *Rabinowitz,* 339 U.S. 56 (1950) that the test in warrantless searches is "not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

The police were in receipt of the vital information for only several hours. It was the police's intention to verify the information and establish probable cause before they acted. Once police verified the information and estab-

lished probable cause, it became necessary to act immediately. If police had delayed, it would have led to the subsequent loss or sale of the narcotics into the community.

It is submitted in conclusion that police had probable cause and reasonable grounds to place the defendant under arrest. The subsequent search and seizure of evidence was lawful based upon probable cause and the exigency of the circumstances.

(B) A police officer may conduct a warrantless search when that search is incident to a lawful arrest, in order to protect himself and to protect the potential destruction of evidence, and any items recovered as a result of that search are admissible as evidence.

As argued previously there was probable cause and reasonable grounds for police to arrest the defendant. The record reflects that the defendant was placed under arrest as soon as officers reached his automobile. The search of the defendant's car was therefore executed incident to a lawful arrest.

It is well settled that, as an exception to the general requirement for search warrants, a police officer may conduct a search incident to a lawful arrest. *Chimel* v. *California,* 395 U.S. 752 (1969). *Preston* v. *United States,* 376 U.S. 364 (1964).

This exception is grounded in the practical consideration that an officer has the right to protect himself and to prevent the potential destruction of evidence. *Preston,* supra.

The evidence reflects that police did believe they were in danger when they stopped the defendant's car and observed the switchblade knife in his hand (TP 41, 42). The

police were merely acting as any reasonable or prudent man would act under the circumstances.

When the subject is under a full custodial arrest, the police may conduct a full search of the person and his possessions at hand, *United States* v. *Robinson,* 414 U.S. 218 (1973).

Once the police placed the defendant under arrest they were permitted to conduct a search of the glove compartment. This was reasonable in light of the fact that the defendant was holding a switchblade knife and was reaching in the direction of a glove compartment where possibly other weapons were present.

The search would not violate the principles establishing the area of control of the arrestee as the area of search. The glove compartment was only a short distance from the defendant's hand. After seeing the defendant holding a weapon in his hand it was not unreasonable for police to believe that he was reaching for another weapon. Any assertion that the glove compartment was not an area within the control of the defendant fails when confronted with the rule of *Chambers,* supra.

It is submitted that since the initial warrantless full-custody arrest was not unconstitutional nor unlawful, it follows that the search incident to such a lawful arrest was without constitutional flaw.

The Court of Appeals for the First Circuit stated in *United States* v. *De Leo,* 422 F. 2d 287 (First Cir. 1970):

> "While the legal arrest of a person should not destroy the privacy of his premises, it does, for at least a reasonable extent, take his own privacy out of the realm of protection from police interest in weapons, means of escape and evidence."

A search incident to a lawful arrest may extend to the arrestee's person and the area within his immediate control. *Chimel,* supra.

It does not matter whether or not the arrestee had been subdued and presents no danger to the police. The authority to conduct a search incident to an arrest once established still exists even after the need to disarm and prevent the destruction of evidence have been dispelled. *Chambers,* supra.

The authority to search the person and his possessions at hand incident to a lawful custodial arrest while based upon the need to disarm and to discover evidence, does not depend on what a Court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found. *United States* v. *Robinson,* supra.

It is therefore submitted that the search and seizure which revealed the .38 caliber handgun and the seizure of the switchblade knife from defendant's hand was lawful. The police did not violate any of the defendant's constitutional rights. The Fourth Amendment protects against unreasonable searches.

(C) Objects falling within the plain view of a police officer who has a right to be in the position to have that view are lawfully subject to seizure and may be introduced as evidence.

Where property is found abandoned in an area free of any expectancy of privacy, there is no standing to object to its subsequent search or seizure, due to the fact that there is no reasonable expectation of privacy and therefore there is no constitutional interest to be protected.

As to State's Exhibit #3, the heroin found by police, it is submitted that its discovery was not the result of an illegal search and seizure nor was it recovered incident to an unlawful arrest.

The heroin was not illegally seized because it was not the product of a search and seizure at all as commonly known. Police recovered the heroin on the ground located on Playtime Lane. The package of heroin came within Agent Handorf's "plain view" as he was making a check of the area where defendant had slowed his vehicle.

As argued previously, Courts have long permitted seizure of items which fall into the plain view of an officer who has a right to be in the position to have that view. *Harris,* supra. Surely Officer Handorf had a lawful right to conduct a check of the street for suspected heroin. The agent did not violate the defendant's constitution rights when he recovered the package of heroin from the street.

It is further submitted that the heroin was abandoned property. Where one abandons his interest in property and where he has no reasonable expectation of privacy in

the property found, he cannot complain of any constitutional violation. *Abel* v. *United States,* 362 U.S. 217 (1960).

Where property is abandoned, then he who abandons it is without standing to object to its subsequent search or seizure. See *Abel,* supra. It has been so held because the security of a property interest, or a reasonable expectation of privacy no longer exists, and, therefore there is nothing for the Fourth Amendment to protect.

The defendant had no standing whatsoever to object to the recovery of the heroin from Playtime Lane. The determining factor is whether the area searched is one in which there is a reasonable anticipation of freedom from governmental intrusion. *Mancusi* v. *De Forte,* 392 U.S. 364 (1968).

In the case at bar the street where the heroin was recovered was a public street. It was clearly not an area in which the defendant could have any expectation of privacy.

Where there is no property interest to be secured, and there is no reasonable expectation of privacy in the thing seized, then there is no constitutional interest to be protected, *Elkins* v. *United States,* 364 U.S. 206 (1960).

The defendant flatly denied any knowledge of the heroin (State's Exhibit #3) and also denied any ownership of the heroin (TP 15). The heroin lying in the street was clearly abandoned. The defendant had no possessory interest in the area where the heroin was found. There was no expectation of privacy involved here. The package of heroin was in the officer's "plain view" and was not recovered as a result of a search and seizure.

CONCLUSION

We respectfully submit that the Motion to Dismiss the Appeal should be granted because:

1. The defendant is endeavoring to raise in this Court questions never previously raised in the State Courts.
2. The defendant-appellant is endeavoring to appeal from a pretrial order on a Motion to Suppress which is only a portion of the total case which might be raised by direct appeal at a subsequent date.
3. The fact that the State grants the plaintiff state the limited right of appeal in pretrial suppression motions does not deprive the defendant-appellant on any constitutional rights.
4. The searches involved were clearly within the constitutional guidelines set by this Court in its various rulings as reflected in the record of the proceedings.

We therefore request that this Court grant our Motion to Dismiss.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-76045

STATE OF OHIO,
Plaintiff-Appellant,

vs.

WILLIAM THEODORE RANKIN,
Defendant-Appellee.

MEMORANDUM DECISION AND JUDGMENT ENTRY

(Filed March 30, 1977)

Messrs. Simon L. Leis, Jr., Thomas P. Longano and Carl W. Vollman of counsel, 420 Hamilton County Court House, Court & Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Mr. Ronald C. Morgan, 138 E. Court Street, Suite 1019, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal of the State of Ohio by leave of this Court first granted, the tran-

script of the docket and journal entries, the original papers from the Court of Common Pleas of Hamilton County, Ohio, the assignment of error, the briefs and arguments of counsel.

The singular assignment of error is:

> "The trial court committed prejudicial error when it granted the defendant's motion to suppress the evidence."

The defendant-appellee, William Theodore Rankin, was charged in a three count indictment with the crimes of having a weapon under disability, carrying a concealed weapon and possession of a narcotic (heroin) for sale. After pleading not guilty to those charges, Rankin filed motions to suppress the evidence which had been both seized from him and otherwise recovered at the time of his arrest by police officers without a warrant. A hearing had upon the motions resulted in an order suppressing a certain gun, knife and a quantity of heroin, thus prompting the prosecution to seek leave of court to appeal.

The transcript of the proceedings establishes that certain police officers received advice from an informant, characterized as reliable and who had provided information earlier which had resulted in the seizure of heroin and a subsequent conviction, that a shipment of heroin was due to arrive in Cincinnati from California on August 15, 1975, to be delivered to one Fred Douglas. The informant stated that two vehicles would be involved, one a Cadillac sedan with an antenna affixed to its trunk lid bearing California license plates and the other to be operated by someone from Tennessee, which were to meet at Douglas' home in an area suburban to Cincinnati. One of the officers receiving the information knew Douglas and the location of his home. Additionally, the informant stated that the defendant-appellee, referred to by him as "Chipper" Rankin, was to receive part of the shipment of heroin.

At some time between 10:00 and 11:00 P.M. on August 15th, the officer to whom the information had been conveyed went to the vicinity of Douglas' home and saw two vehicles which matched the descriptions given. At about 1:30 A.M. on August 16th, that officer arrived at Rankin's house and shortly thereafter saw, with the aid of binoculars, Rankin apparently engage in a telephone conversation and almost immediately thereafter observed him leave in an automobile bearing a license numbered CHIP 5.

Rankin was followed by the officer to Douglas' home, which he entered. The officer testified that Rankin was then empty handed. Some fifteen minutes later, Rankin left the house hurriedly carrying a package somewhat larger than the hand in which he held it.

By radio, the officer summoned other police and followed Rankin's car as it left the scene. What was characterized by the police as a "high speed chase" developed.

While being pursued, Rankin at one point slowed his car to some 5 MPH and then accelerated. Shortly thereafter, the police were able to stop Rankin.

They testified that when they reached the side of Rankin's car he had a switchblade knife in his hand and was leaning toward the glove compartment. Rankin was disarmed of the knife and a loaded .38 caliber revolver, later test fired and found to be operable, was recovered from the compartment. The officers testified that after his arrest Rankin was advised of his constitutional rights and then told them that he carried the gun for protection.

One of the police searched the area in which Rankin had sharply reduced the speed of his car and returned with a paper sack containing packets holding 3.6 ounces of a substance later found to be heroin.

On his own behalf, Rankin claimed that he had left his home about midnight on August 16th to go to a party at Douglas' home but remained there only fifteen minutes because it "wasn't any hip." When he left, he became aware he was being followed and increased the speed of his car accordingly. He testified that after being stopped he was "jerked" from his car by men dressed in civilian clothing and told he was under arrest for possession of narcotics. He denied having a knife in his hand, claiming that it was under the passenger seat of the car, and that the revolver was removed from a locked glove compartment.

On cross-examination, Rankin denied ownership of the knife, the gun, the automobile he was driving, and asserted he had never seen the heroin before it was brought back by the police. He admitted he knew of two of the arresting officers from earlier contacts with them as policemen and that he had been convicted of a state or federal offense.

To contradict the assignment of error, the appellee argues that the police upon the facts in the case lacked probable cause to arrest him principally because they did not know that the heroin was in fact at Douglas' home; that there were no exigent circumstances justifying the warrantless search of the car he had been operating and that the illegality of the arrest and subsequent search invalidated the seizures of the evidence.

Our examination of the record convinces us that the information supplied the police meets the test for sufficiency to establish probable cause to arrest without a warrant. That test is set forth in *State* v. *Timson* (1974), 38 Ohio St. 2d 122, the first syllabus of which in pertinent part is:

> "... To have probable cause, the arresting officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused ..."

When the testimony adduced upon the hearing of the motion to suppress is assessed in its entirety it is manifest that vastly more than mere suspicion motivated the police to make the arrest and that they acted as reasonable, prudent and experienced officers.

Similarly, we believe that the totality of the circumstances revealed in the record justify the conclusion that exigencies existed which necessitated the search incident to the arrest. When it is given that police observed the appellee act as they testified he did, some of which actions are admitted by him, the search of the car and the area within the immediate control of the appellee was justified to prevent the possible destruction or spiriting away of evidence. See *Chambers* v. *Maroney* (1970), 399 U.S. 42; *Chimel* v. *California* (1969), 395 U.S. 752; *United States* v. *Robinson* (1973), 414 U.S. 218.

With respect to the heroin recovered by the arresting officers, the record justified its seizure either on the theory that it was in the plain view of the police having been found on the sidewalk adjacent to the street upon which Rankin's vehicle had been stopped or because it was abandoned property in which Rankin disclaimed ever having had any possessory right or interest. Clearly, there could be nothing unlawful in the officers' appropriation of the heroin if it was in fact abandoned, a conclusion we believe in the case *sub judice* to be inescapable. See *State* v. *Brown*, No. C-74256 (1st Dist., July 21, 1975) citing *United States* v. *Colbert* (5th Cir. 1973), 474 F.2d 174 and *Abel* v. *United States* (1960), 362 U.S. 217.

We find that where, as here, evidence of probative value establishes that a warrantless arrest was made by police upon information from a reasonably trustworthy source

verified by their independent investigation and that a warrantless search of an area of an automobile being driven by the person arrested immediately before his apprehension, that area being accessible to him, resulted in the recovery of a knife from that person's hand, a loaded, operable revolver from the area searched and heroin either in plain view or constituting abandoned property, a court errs in granting a motion to suppress that evidence so seized.

Resultantly, we find the assignment of error to be well taken.

The order of the Court of Common Pleas of Hamilton County granting the motions of the defendant-appellee, William Theodore Rankin to suppress the evidence is reversed and this cause is remanded for further proceedings according to law.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellee, by his counsel, excepts.

SHANNON, P. J., BETTMAN and CASTLE, JJ.